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In the Supreme Court of the United States

OCTOBER TERM, 1991

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Plaintiffs' brief in opposition is long on conclusory rhetoric but short on substantive legal analysis. As we show below, their arguments are insufficient as a matter of law to sustain the Ninth Circuit's rejection of the domestic defendants' McCarran-Ferguson and state action defenses. Moreover, apart from their mischaracterization of the legal issues involved, plaintiffs do not deny the public importance of this case or of the questions presented for review. The need for this Court's intervention is underscored by the four *amicus* briefs that have been submitted in support of our petition.

Before we turn to the specific questions presented, it is first necessary to address plaintiffs' repeated assertion that the procedural posture of this case makes further review unwarranted. Although plaintiffs emphasize that the case arises on pretrial motions, they *nowhere* point to *any* factual issue material to the proper analysis of the controlling legal issues that would be illuminated by a full trial—a trial that plaintiffs do not dispute would be extremely costly and time-consuming for both sides and for the judicial system itself.[1] Judge Schwarzer explained (Pet. App. 83a-84a) that plaintiffs had every opportunity in the district court to spell out their legal theories, and they have had similar opportunities in the court of appeals and in this Court; accepting all of plaintiffs' factual allegations as true, it is clear that those theories do not state a cognizable antitrust claim.

Contrary to plaintiffs' argument, this Court frequently has granted certiorari to decide important antitrust issues,

[1] As Judge Schwarzer emphasized (Pet. App. 35a & n.2, 57a-58a, 83a-84a), plaintiffs before filing the complaints undertook "the most extensive multi-State antitrust investigation ever conducted," which lasted two years and involved the production of "tens of thousands of documents" and depositions and interviews with "hundreds of witnesses." *Hearings on S. 1299 Before the Subcomm. on Antitrust of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 15 (1988) (statement of New York Attorney General Robert Abrams).

including issues under the McCarran Act, where the court of appeals reversed the district court's dismissal of the complaint and remanded for further proceedings. See, *e.g.*, *Summit Health, Ltd.* v. *Pinhas*, 111 S. Ct. 1842, 1844 (1991); *Matsushita*, 475 U.S. at 578-582; *Pireno*, 458 U.S. at 124-125; *Royal Drug*, 440 U.S. at 207-208; *Barry*, 438 U.S. at 533-534. Here, too, the Ninth Circuit's rulings of law on the threshold McCarran and state action issues present important questions that warrant review regardless of whether plaintiffs could actually prove their factual assertions at trial.

Immediate review is especially justified in this case not only because applicable principles of federalism preclude federal court adjudication of disputes that are properly left to state regulators to resolve (see Pet. 10), but also because of the disruptive consequences of the Ninth Circuit's decision for the business of insurance. This Court has recognized that insurance companies have a "vital" interest in being able to rely upon existing law to structure their operations to accommodate risks over long periods of time; "[d]rastic changes in the * * * governing * * * legal rules" impair that stability and upset the premises upon which the business has been conducted. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 246-247 (1978). As the *amicus* briefs attest, the decision below has thrown into doubt the most basic legal principles governing the business of insurance on which the entire industry has relied since the enactment of the McCarran Act, and nothing at trial can alleviate that disruption.

I. THE DOMESTIC INSURERS AND REINSURERS DID NOT FORFEIT THEIR McCARRAN IMMUNITY BECAUSE OF THE INVOLVEMENT OF FOREIGN REINSURERS

The petition explains why the court of appeals plainly erred in holding that the domestic insurance and reinsurance entities lost their McCarran immunity by participating in the business of insurance with "non-exempt"

foreign reinsurers. Instead of defending the court of appeals' holding that the foreign reinsurers were "nonexempt *entities*" (Pet. App. 20a (emphasis added)), plaintiffs' brief in opposition (at 12-14) attempts to recast the opinion on the fundamentally different ground that the case involves "unregulated *agreements*," "unregulated (and therefore nonexempt) *conduct*," and "unregulated * * * *activity*" (emphasis added). Plaintiffs' inability to defend the Ninth Circuit's rationale is telling evidence that the opinion below is simply indefensible.[2]

As the petition demonstrates, the Ninth Circuit's ruling cannot be reconciled with the language of the McCarran Act or the intent of Congress. Indeed, the court's interpretation would render the Act nonsensical and self-defeating. As the text and legislative history make clear, and as plaintiffs do not dispute, Congress (1) understood that reinsurance is integral to the business of insurance,[3] (2) recognized that foreign reinsurers played a major role in United States insurance markets, (3) determined that states should continue to regulate the insurance industry, and (4) intended that the business of insurance be exempted from federal antitrust laws. See Pet. 16-17, 23-24. Plaintiffs' argument therefore would deny antitrust immunity to *domestic* insurers whenever, as commonly occurs (*id.* at 2, 15), they agree with foreign re-

[2] Although plaintiffs emphasize that the Department of Justice's *amicus* brief in the court of appeals supported them on other issues, they fail to point out that the government did not address the forfeiture issue. Plaintiffs also fail to note that the Department's brief (at 11 n.9) reiterates the government's earlier conclusion (see Pet. 11 & n.10) that the "primary cause" of the so-called "insurance crisis" of the mid-1980s was the system of tort liability and *not* any conspiracy or boycott of the sort plaintiffs allege. For the Court's convenience, copies of the government's *amicus* brief are being lodged with the Clerk.

[3] Notwithstanding plaintiffs' analogy (Br. in Opp. 15 n.16), reinsurers are not like suppliers of steel to the automobile industry. Instead, as Congress recognized (see Pet. 17), they have a critical and legitimate interest in the terms of primary insurance policies that they will be asked to reinsure.

insurers as to rates and terms of insurance precisely as Congress contemplated. Such a perverse result would radically unsettle the business of insurance and, contrary to plaintiffs' suggestion (Br. in Opp. 14-15), is not confined to boycotts but rather extends to all alleged antitrust violations. See Pet. 14 n.17.

Unable to explain away this fatal defect in the court of appeals' decision, plaintiffs principally rely on antitrust immunity cases outside the McCarran context. The immunities at issue in those cases, however, bear no resemblance to that provided by the McCarran Act. Most importantly, those immunities were strictly confined to specifically identified parties; the participation of other entities accordingly was held to remove the challenged conduct from the scope of the intended immunity. The McCarran Act, by contrast, "refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.'" *National Sec.*, 393 U.S. at 459 (emphasis added by Court). Only by mistakenly focusing on the regulated status of each alleged *participant*, as the court of appeals did, rather than asking whether the challenged *conduct* involved the business of insurance regulated by the states, could it be concluded that the domestic defendants lost their McCarran immunity.

Nor does *Royal Drug* support the ruling below. As this Court reaffirmed in *Pireno*, a case the Ninth Circuit ignored, even the involvement of an entity outside the business of insurance is at most only one factor in the McCarran analysis and does not by itself preclude immunity. See Pet. 16. Plaintiffs' attempted distinction of *Pireno* as relevant only to the "business of insurance" element of the McCarran defense is unavailing because it is equally applicable to the *Royal Drug* opinion on which they and the court of appeals purport to rely.

Failing to find support in this Court's precedents, plaintiffs seek refuge in the maxim of statutory construction that exemptions from the antitrust laws should be "narrowly construed." That maxim cannot be invoked, however, to defeat the clearly expressed intention of Congress. See *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989) (rules of interpretation apply to "close cases, or when statutory language is ambiguous").[4] The petition demonstrates (at 15-17)—and plaintiffs do not refute—that the language and legislative history of the McCarran Act do not admit of the court of appeals' forfeiture ruling. If anything, given the dominant purpose of the McCarran Act to provide immunity from federal antitrust scrutiny for the business of insurance, it is asserted exceptions to the immunity, not the immunity itself, that should call for critical appraisal and narrow application. See, *e.g.*, *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989) (exceptions to a general statute are to be "read * * * narrowly in order to preserve the primary operation of the provision"). Plaintiffs' proffered canon of construction cannot justify the court of appeals' "eviscerat[ion of the] legislative judgment." *Ibid.*

II. AS A MATTER OF LAW, INSURERS' AGREEMENTS OVER COVERAGE AND TERMS OF INSURANCE ARE NOT A BOYCOTT UNDER THE McCARRAN ACT

Plaintiffs' brief in opposition is revealing on two essential points. First, the alleged "boycott" in this case amounts to nothing more than agreements among primary insurers and reinsurers over the coverage risks they would underwrite. Our petition (at 24-25) invited plaintiffs to support the court of appeals' critical but unexplained assertion that this case involves "much more" than such agreements. Pet. App. 21a. Plaintiffs' entire response (Br. in Opp. 2, 4-5), stripped of its pejorative rhetoric and conclusory labels about "boycotts,"

[4] See also Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1990) ("the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right").

"coercion," and "enforcement" (see Pet. 25),[5] is that (1) primary insurers "met with" reinsurers and "collectively" agreed upon the terms of insurance they would offer—*e.g.*, whether the advisory policy forms would be claims-made or occurrence forms, and whether they would cover pollution risks—and (2) defendants then acted in accordance with their agreement—*e.g.*, by offering insurance and reinsurance on the agreed-upon terms, and by discontinuing statistical support for obsolete and superseded forms (see Pet. App. 55a-56a n.20). Plaintiffs' contention in their brief in opposition that the agreement had consequences in insurance markets does not alter the essential character of the conduct they challenge as a violation of the antitrust laws: an agreement among insurers and reinsurers over terms and conditions of insurance.

Second, the legal question presented by plaintiffs' allegations—whether agreement by insurers over coverage risks constitutes a "boycott" under the McCarran Act—plainly deserves this Court's review. Plaintiffs' defense of the court of appeals' reasoning consists largely of snippets taken out of context from *Barry*. That submission completely disregards the recognition by both the majority and the dissent in *Barry* that agreements over terms and conditions of insurance are *not* "boycotts." See Pet. 19. It also fails to come to grips with the conflict created by the Ninth Circuit's ruling (*id.* at 20-21) or the confused state of the law under *Barry* as reflected in both judicial decisions and academic commentaries (*id.* at 18 & n.18, 21-22)—a situation that belies plaintiffs' assertion (Br. in Opp. 8) that the decision below rests on "the clear line [under *Barry*] between conduct constituting an actionable boycott and conduct constituting permissible joint activity."[6] Nor is plaintiffs' argument faithful to the legislative history and purposes of the McCarran Act, which unmistakably demonstrate that agreements as to rates or terms of insurance do not amount to boycotts. Pet. 22-24.[7]

[5] Judge Schwarzer noted that plaintiffs' boycott allegation was "just semantics. * * * [Y]ou try to enlarge on that [alleged agreement not to offer certain coverage] by dressing it up in pejorative language which doesn't seem to add anything to the fundamental allegations in this case." 9/15/89 Tr. 7-8. See also Pet. App. 43a, 50a-51a.

III. THE STATE ACTION DOCTRINE APPLIES TO PLAINTIFFS' FORMS DEVELOPMENT CLAIMS

The brief in opposition effectively confirms (at 5, 17) our statement (Pet. 27 n.21) that "the state regulators (whom the *Parker* doctrine protects) have the tools they need to deal with any alleged misconduct." Plaintiffs also do not dispute our observation (*id.* at 29 n.22) that state attorneys general participated extensively in the process by which the CGL forms received state approval and could have aired their complaints there. Similarly, they do not contest that "the two concerns that are the gravamen of plaintiffs' forms development claims * * * were evident in both the state review process

[6] Plaintiffs acknowledge this conflict (Br. in Opp. 11-12) but claim that it has no relevance here because this is not a "consumer boycott" case. Plaintiffs' attempted distinction is both incorrect and irrelevant. None of the cited authorities draws this distinction—indeed, *Barry* surely looks in quite the opposite direction (438 U.S. at 552)—and plaintiffs studiously disregard the cases (*e.g.*, *In re Workers' Compensation Ins. Antitrust Litig.*, see Pet. 22) that do not fit their Procrustean analysis. Furthermore, as plaintiffs themselves explain (Br. in Opp. 11-12 n.12, 15 n.16), primary insurers are "consumers" of reinsurance, and therefore this case squarely involves an alleged "consumer boycott."

[7] Plaintiffs' rendition of the legislative history (Br. in Opp. 9 n.8) not only is misleadingly truncated but ultimately fails to support their position. Unlike the conduct alleged in *SEUA*, the present case does not by any stretch involve a cartel that established " 'a system of private government' " to regulate the conduct of nonmembers and to " 'penalize * * * [those that] do business * * * in any way that was disapproved by them.' " Br. in Opp. 9 n.8 (citations omitted). Rather, the allegations here are predicated on an agreement among insurers *as to the terms on which they would do business*. There is no allegation that *any* primary insurer was unable to purchase reinsurance for coverages under the advisory forms.

and the open debates and media coverage in the insurance industry." *Id.* at 29. Why, then, is a federal antitrust court the proper tribunal to pass judgment on insurance forms that were collectively developed pursuant to state statute and approved after *extensive* state regulatory review?

Not surprisingly, plaintiffs do not cite any *state action* decision supportive of the ruling below. Instead, after citing state action decisions for the most general and uncontested principles (Br. in Opp. 16), plaintiffs rest their entire state action argument (*id.* at 17-18) on a footnote in *Barry* (438 U.S. at 554 n.26) that did not address the state action doctrine.[8]

The errors in what plaintiffs *do* say are even more striking. They claim, for example, that the state action doctrine is inapplicable "because some of the anticompetitive acts occurred *after* the approval of policy forms." Br. in Opp. 17. But petitioners did not invoke, and the district court did not apply, the state action doctrine for acts occurring after approval of the CGL forms. See Pet. App. 59a (discussing the "limited * * * scope" of the state action argument). Plaintiffs' statement thus merely obscures what is at issue here.[9] Likewise, plaintiffs argue that "[n]owhere do the complaints attack or even question the regulatory acts of state officials." Br. in Opp. 19. Plaintiffs' case is premised, however, on the claim that the antitrust laws prohibit development and use of forms that state officials have approved. Plaintiffs could not have made that point any plainer than they did by demanding in their complaints that a federal court enter an injunction requiring CGL forms to be issued with provisions quite different from those state officials approved. See Pet. 7 n.4.

[8] *Barry* involved only McCarran and not *Parker* immunity. Activities may lack McCarran immunity but nevertheless be immune under *Parker*. See *Health Care Equalization Comm.* v. *Iowa Medical Soc'y*, 851 F.2d 1020, 1027 n.10 (8th Cir. 1988); *Barry* v. *St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3, 8 (1st Cir. 1977), aff'd on other grounds, 438 U.S. 531 (1978).

[9] Plaintiffs object to the petition's focus on "mere forms development." Br. in Opp. 18. But, as Judge Schwarzer correctly understood, defendants' state action argument "does not reach conduct outside of the collective activities to revise the CGL policy forms" (Pet. App. 59a).

Here, competition has been displaced with regulation. The states authorize insurance companies to collectively develop and agree upon standardized advisory forms. That fact alone suffices to meet the "clear articulation" prong of the state action test (see Pet. 27), and it is remarkable that plaintiffs would suggest (Br. in Opp. 17, 18)—as the Ninth Circuit did not—that there is any doubt about the first prong.

Similarly, there was "active supervision" here. See Pet. 3-6, 27-28. Plaintiffs do not dispute that "state regulators s[aw] some public manifestation of the boycott" before they approved the CGL forms (Br. in Opp. 19), and they do not question the thoroughness of the process of review. They nonetheless dismiss the entire state regulatory process as insignificant because state officials approved only the forms and did not "approv[e] or supervis[e] * * * the agreements and boycotts" (*id.* at 17). But making the state action doctrine turn on oversight of the *process* by which agreement is reached—rather than authorization of collective action and approval of the end result—would be completely unworkable in practice and would allow easy circumvention of the doctrine by a mere trick of pleading.[10]

Plaintiffs know better. The States of California, Colorado, Nebraska, and South Dakota recently advised this

[10] Suppose, for example, that a state authorized collective ratemaking in the motor carrier industry, and motor carriers jointly developed and submitted a rate that was carefully scrutinized for reasonableness and approved. Except in the purely hypothetical situation in which all carriers came to the bargaining table with the exact same idea of what rate to charge, there would necessarily be "behind the scenes" disagreements, give-and-take, and ultimate compromise in selecting the rate, all of which would violate the antitrust laws but for state action immunity.

Court in their *amicus* brief in *Ticor* (at 16) that "[i]t is the *fact* of supervision, not the *substance* of it which is the crux" of state action immunity. Moreover, "[n]o matter *how* the rates [and forms] are formulated, e.g., based on competitive market conditions or otherwise, once they are submitted for review for consistency with the expressed state policies, they are subject to the first prong of *Midcal*, namely, they are pursuant to a clearly articulated policy of the State." *Id.* at 20; see also *id.* at 13.

Plaintiffs now argue that the CGL forms did *not* conform with substantive state policy because the relevant states disapprove of boycotts. Br. in Opp. 17. But it turns the state action doctrine on its head to say that such a claim of nonconformity with state policy, despite state approval, justifies *federal* scrutiny. Plaintiffs' allegations of nonconformity with state law should have been made to state regulators, not to the federal antitrust court. Pet. 30; see *City of Columbia*, 111 S. Ct. at 1352.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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